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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 724.

ALBERT A. CARMICHAEL, as Attorney General of the State of Alabama, et al., *Appellants*,

v.

THE SOUTHERN COAL AND COKE COMPANY, *Appellee*.

No. 837.

CHARLES C. STEWARD MACHINE COMPANY, *Petitioner*,

v.

HARWELL G. DAVIS, Individually and as Collector of Internal Revenue, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR APPELLEE IN CAUSE NO. 724 AND PETITIONER IN CAUSE NO. 837.

BORDEN BURR,
WALTER BOULDIN,
WILLIAM LOGAN MARTIN,
NIEL P. STERNE,
Counsel for said Appellee and Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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POINT I.

FLORIDA v. MELLON, 273 U. S. 12, IS NOT AUTHORITY FOR THE ACTION OF CONGRESS IN ENACTING THE SOCIAL SECURITY STATUTE.

(a) The drawback statute considered in *Florida* v. *Mellon* was a genuine withdrawal of one sovereign from a field where double taxation was a serious evil.

Death duties were known to the Roman law. The States had imposed such duties since their creation. Congress had

imposed a legacy tax as early as 1797, Act of July 6, 1797, c. 11, 1st Stat. 527. It was felt that the State as the regulator of successions and inheritances was the proper sovereign to impose such taxes, and traditionally the Congressional tax had been employed mainly to redress emergency impairments of finance. At the time of the enactment dealt with in *Florida* v. *Mellon*, forty-five States were imposing inheritance taxes.

In reporting the bill which eventually became the Revenue Act of 1926, Federal Estate Tax, Section 301, the Committee quoted the following statement of Senator Simmons, reporting the 1917 bill:

> "On the other hand, as a permanent measure, such a tax, even at the rates already fixed by existing law, trenches in considerable degree on a sphere which should be reserved to the States."

The 1926 report then continued:

> "The Committee agrees with the statement of its then Chairman, made in 1917. This is peculiarly a form of taxation which should be within the province of the several states to such extent as they upon their own volition of choice desire to exercise it." Senate Report No. 52, 69th Congress, 1st Session, page 8.

In the instant matter, taxation of the field in question was practically unknown. Double taxation, therefore, neither existed nor was anticipated.

(b) By the statute dealt with in *Florida* v. *Mellon*, the partial withdrawal from the estate tax field was unconditional. The instant enactment is conditioned upon the States' compulsive adoption of a colossal fiscal and sociological system with delegation to Congress of control over inalienable State functions.

POINT II.

ARTICLE I, SECTION 8, CLAUSE 1, OF THE CONSTITUTION DOES NOT AUTHORIZE THE EXERTION OF THE TAXING POWER IN ORDER TO COMPEL THE STATES TO SET UP RESERVES WHICH WILL HAVE THE EFFECT OF LESSENING APPLICATIONS FOR CONGRESSIONAL AID IN FUTURE DEPRESSIONS.

The tremendous expenditures by the Federal Government to alleviate the recent depression, no matter how commendable and no matter how badly needed, were voluntary. If they were authorized at all under the Constitution, it is because there must be in every Constitution an implied power of self-preservation. The duty to provide indigent relief in normal as well as in depressed times is a duty of the States, and Congress is not empowered to tax and appropriate for relief of individuals except where the States cannot and the Federal Government is confronted with an actual, presently existing emergency involving real danger to the Government and its citizens. Congress cannot, in speculation that such a situation may arise in the future, tax and appropriate, or take over State functions in an attempt to forestall or make provision for such a future possibility.

POINT III.

THE PROVISION IN TITLE III OF THE SOCIAL SECURITY ACT FOR THE OPERATING EXPENSES OF STATE UNEMPLOYMENT AGENCIES IS BEYOND THE CONSTITUTIONAL POWERS OF THE FEDERAL GOVERNMENT AND ANY TAX FOR SUCH PURPOSE IS UNLAWFUL.

Title III is inescapably related to Title IX and Title IX is inoperable without Title III. Therefore, the illegal defraying of State expenses embodied in Title III is fatal to Title IX. The enunciation through Mr. Justice Catron

in the Passenger cases, 48 U. S. (7 How.) 283, "Nor has Congress power to lay taxes to pay the debts of a state" carries with it the corollaries that Congress has no right to appropriate to pay such debts, nor has Congress the right either to tax or appropriate to pay the running expenses of a State Government or any agency thereof.

"State expenses cannot be provided for by Federal taxation," Cooley on Taxation, 108. If Congress may lawfully tax or appropriate for the purpose of paying the running expenses of State unemployment commissions for the reason that the functions so administered will be promotive of prosperity and minimize relief calls upon the Federal Government in future depressions, there would seem no reason why Congress could not upon the same theory and for the same reason appropriate for the running expenses of any branch of a State government which is concerned with the economic welfare of the State. Upon such a basis, Congress would have the right to levy taxes to furnish the running expenses of State Departments of Commerce, Agricultural Departments, Bureaus of Mines, Departments of Banking, Insurance, etc. We submit manifestly Congress has not power so to provide, nor has it power to provide the operating expenses of unemployment commissions for the States.

Sections 301 and 302-a provide operating expenses for all State unemployment commissions set up under Title IX. Sections 303 (a-5) and Section 903 (a-4) provide, insofar as concerns the actual practicalities of the situation, that the moneys furnished under Title III shall be the sole source of administration expenses for State Commissions. The inhibition against using for administration moneys raised by exactions upon payrolls from every standpoint of feasibility throws the States back upon the support provided in Title III. Congress, with its knowledge of State problems of financing, must necessarily have known and intended that its inhibition against the administrative expenditure of funds raised for unemployment relief would ren-

der the States entirely dependent upon the sustenance provided in Title III.

POINT IV.

IF THE UNEMPLOYMENT FUNDS DEALT WITH IN TITLE IX ARE STATE FUNDS, CONGRESS CANNOT PRESCRIBE REGULATIONS IN RESPECT THEREOF. IF THEY ARE FEDERAL FUNDS, THE EXACTION LEVIED IN TITLE IX IS VOID AS AN EXPROPRIATION OF MONEY FROM ONE GROUP FOR THE BENEFIT OF ANOTHER.

Congress, concededly having no regulatory power over employers and employees in the several States, cannot so expropriate as a regulation of that relationship. It can never under Article I, Section 8, Clause 1, of the Constitution levy an expropriative exaction. That clause authorizes only true taxation, not expropriations from group to group under the name or guise of a tax.

> "It is inaccurate and misleading to speak of the exaction from processors prescribed by the challenged act as a tax, or to say that as a tax it is subject to no infirmity. A tax, in the general understanding of the term, *and as used in the Constitution,** signifies an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation. But manifestly no justification can be found for it unless as an integral part of such regulation."
>
> *United States* v. *Butler*, 297 U. S. 1.

*Emphasis supplied.

POINT V.

NUMERICAL CLASSIFICATION.

The confining of this tax to employers of eight or more cannot be justified on the ground that as to the smaller groups the revenue would not justify the pursuit, because in Title VIII, although the rate of tax is no higher, employers of one to seven are taxed.

POINT VI.

THE ELIMINATION OF THE REGULATORY REQUIREMENTS OF SEC. 303 (a) AND 903 (a) WOULD NOT LEAVE A STATUTE CAPABLE OF ENFORCEMENT AS AN EXPRESSION OF CONGRESSIONAL WILL.

The elimination of these clauses would remove the heart of the Congressional plan. It would be the sheerest speculation to assume that the Act without these requirements would be in accordance with the intent of Congress. (*Carter* v. *Carter Coal Co.* 298 U. S. 238) In fact in other parts of respondent's brief these features are stressed as absolute essentials. (Respondent's brief 72-77 and 111-113.)

Respectfully submitted,

BORDEN BURR,
WALTER BOULDIN,
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NIEL P. STERNE,
Counsel for Appellee in No. 724 and Petitioner in No. 837.

ERRATA.

(In Brief in Cause No. 724)

Page 4, second paragraph: Figure should be $7,300.00.

Page 4, third paragraph: Figure should be $3,519.17.

Page 13, third paragraph: Word "inflicted" should be "infected."

Page 17, last paragraph: The word "provisions" should be followed by "and."

Page 19, last paragraph: Word "in" should be "by."

Page 44, second paragraph: The sentence with reference to a revenue measure should be eliminated. It was correct as originally inserted in the lower court brief but became incorrect after the decision of the Supreme Court of Alabama and was brought into this brief by inadvertence.

Page 52, second line: Word "extraction" should be "exaction."

Page 63, seventh line: Following the word "action" the following words should be inserted: "but can coerce or purchase State action."

Page 80, twelfth line: Following the word "Constitution" the following should be inserted, "(except where the context plainly demanded a different connotation)".